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Brief of Jones for D. E.

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SUPREME COURT OF THE UNITED STATES

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JAMES H. MCKENNEY,
Clerk

E. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADDEN, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

R. H. JONES,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

D. P. TARPEY, PLAINTIFF IN ERROR,

vs.

ANDREW MADSEN, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

The action is one of ejectment brought by plaintiff in error as grantee of the Central Pacific Railway Company against Andrew Madson the patentee of the United States. A non suit was granted in trial court from which plaintiff in error appeals. The record shows that prior to the 20th day of October, 1868, the alleged date of the definate location of the railroad, the land in question was settled upon and occupied and claimed by a qualified entryman, Moroni Olney (T. of R. 9). The land was not surveyed and a plat filed in the United States Land Office until 1869 (T. of R. 7). The Land Office was not opened until April or May, 1869 (T. of R., 8). On the 29th day of May, 1869, Moroni

Olney, in pursuance of a settlement made prior to October 20, 1868, filed a pre-emption declaratory statement covering the land in dispute. It is true this pre-emption declaratory statement alleged settlement on the 23rd day of April, 1869, but that is immaterial for the reason that the officers of the land department are presumed to have done their duty and before they permtted this filing and before they accepted Moroni Olney's money a hearing must have been had in which it was shown that the settlement was made prior to the definite location of the road and in which it was shown that this land was excepted from the grant. A finding to this effect must have been made before the pre-emption declaratory statement was accepted and made a matter of public record. The acceptance of this D. S. was a judicial act. It will be presumed that the officers acted on sufficient evidence. The railroad company did not appeal. (Burnham vs. Starkey, 21 Pac., 629.) The settler could not file until the land was surveyed and until the Land Office was opened. The settlement and occupancy alone would be notice to the railroad company, it being impossible to make a filing.

The fact that a patent was not issued to Andrew Madsen until 1896 does not effect the case because Moroni Olney's settlement and filing under the pre-emption laws excepted the land from the grant. The acts of Congress material to this case are:

The general pre-emption law showing the right of the entryman, Rev. Stat. U. S., Sec. 2266, which law was

extended over Utah by the act of July 16, 1868, establishing also a land office at Salt Lake City (15 Stat. at large, 91). (2) The act of July 1, 1862 (12 Stat. at large, 489), making the grant to the Pacific railways, which act contains the reservation from the grant, of land to which pre-emption or homestead claim may have been attached (Section 3 of that act). (3) The act of July 2, 1864, (13 Stat., 356). Section 4 of this act amended the former act. The congressional record shows that numerous petitions were sent to Congress praying for protection to settlers and the following proviso was put into the act in consequence thereof: "And any lands granted by this act or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any bona fide settler. (4) The joint resolution of April 10, 1869 (16 Stat. at large, 59), and the act of May 6, 1870. (5) The act of 1876 (19 Stat. at large, 35), confirming all pre-emption and homestead claims prior to notice of withdrawal at local land offices.

The claim of the plaintiff in error is in effect that the land passed to the company for the reason that on October 20, 1868, the alleged date of definite location, there was no filing of public record. No declaratory statement could be filed prior to October 20, 1868, for the reason that the land was not surveyed and a plat filed in the United States Land Offices until 1869. (T. of R., page 7,

item 7). No declaratory statement could be filed prior to October 20, 1868, for the reason that the land office was not opened in Utah until 1869. (T. of R., page 8). Again, no declaratory statement was required on land of this character. "The act of March 27, 1854, for the relief of settlers on lands reserved for railroad purposes, and the rules and regulations prescribed by the Secretary of the Interior, in pursuance with that act, dispense with the declaratory statement."

> Collins vs. Bartlett, 44 Cal., 382.
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> Lester's Land Laws, 213, No. 234; instructions thereon, Lester, 376, No. 413; see also decision of J. S. Wilson, Commissioner of General Land Office, in case of Watson vs. The Western P. R. R. Co., dated March 29, 1869, Land Laws by Zabriskie, 101.

We return now to the fact as to whether the land passed to the railroad company at the date of the definite location of its road. We have already called attention to the joint resolution of May, 1869, before which it could not be told whether the Union Pacific or Central Pacific could claim these lands. Next we have shown the law giving to the pre-emption claimant the right to purchase land that he had settled upon, and that he had three months after the filing of the plat in which to make his entry. This right could not be destroyed by the failure

to open the land office, because prior to that time the land office had been provided for by act of July, 1868.

In 1850 the Territorial government of Utah was organized. Congress passed the organic act and thereby extended an invitation to the citizens of the Government to establish their homes in the territory. Under this invitation citizens took up their abode here in great numbers. It was, of course, indisputably necessary that these settlers should found cities and villages at once and enter into possession of portions of the public domain. By the act of July 16, 1868, the pre-emption, homestead and other laws of the United States applicable to the disposal of the public lands were extended over Utah Territory and a land office established. The executive officers of the United States failed to open the land office in Utah until 1869. The survey was not approved and a plat thereof filed in the United States Land Office until 1869. The population of Utah Territory in 1869 was 150,000. (Zab. Land Laws, 605). The citizens who had settled upon lands within the 40-mile limit of the grant to the Union and to the Central Pacific railroads could not make their filings until the land office opened and until the plats of survey had been filed and approved. The pre-emption law provided (Section 2236 R. S.) that the pre-emption claimant must file the declaratory statement within three months from the date of the filing of the plat of survey. It is also a well established rule "that when an individual in the prosecu-

tion of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

Lytle vs. State of Arkansas, 9 How., 314.
The Yosemite Valley case, 15 Wall., 77.
Beaty vs. Sale, 43 Ill., 351.
Kite vs. Tibbs, 23 Cal., 432.

The fact then that the survey was not approved or filed, and the fact that the land office was not opened until 1869, did not destroy any pre-emption claim; it merely extended the time to make the filing until the land office was opened.

The Department of the Interior has uniformly held that a settlement made by a qualified pre-emptor prior to the definite location of the road, and the filing of a declaratory statement in pursuance of such settlement, excepted the land from the grant. The decisions of the Department of the Interior have been acquiesced in for a period of about thirty years. The railroad companies have never taken a case to the higher courts from Utah involving the exception of a pre-emption claim. Although about thirty years have gone by the question has never been raised before that the mere fact that the executive officers neglected to open a land office would enlarge the grant to the company—thus including all the land settled upon

and all the towns occupied within the 40-mile grant limit between Wyoming and Nevada. The question was however agitated before the department and before Congress and to forever settle it, on the 21st day of April, 1876 (19 Stat at large, 35), Congress passed an act entitled an act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants where such entries have been made under the regulations of the Land Department.

In the case of Taberck vs. B. M. R. R. Co. (13 Fed. Rep., 105), the Court says: "That act (referring to the above act) like previous laws of a similar kind, was intended to give force and effect to the principle that when an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. (Lytle vs. State of Arkansas, 9 How. 533). But this principle applies only when by law or contract the acquisition of a right is made dependent upon the performance of certain specified acts."

An attempt was made in Congress to amend this confirmatory act of 1876 by inserting a provision that vested rights should not be interfered with. The amendment was not made. Congress had the power to alter, amend or repeal the Pacific Railroad act.

Menotti vs. Dillon, 167 U. S., 712.

Again, even if it be conceded that this patent could

be collaterally attacked, the appellant here did not negative in his proof the terms of the proviso of the act of July 2, 1864 (13 Stat., 356). The grant did not defeat or impair (1) any pre-emption or homestead claim. (Claim is the word used, not "right.") (2) any swamp land, (3) any other lawful claim, (4) any Government reservation, (5) any mineral land, (6) the improvements of any bona fide settler. This he was compelled to show.

Corinne Mill Co. vs. Johnson, 7 Utah, 327.

Same case affirmed, 156 U. S., 574.

He did not show even that this land was at the date public land; he did not show that it was not reserved; he did not show there was any other lawful claim upon the land; he did show it was not included in any military or Indian reservation, but not any other Government reservation; nor did he show the land was not covered by the improvements of any bona fide settler. This last provision of the proviso refers to the land of any settler in good faith who intends to acquire the Government title.

McLaughlin vs. Menotti, 89 Cal., 355.

It is true that in a later case it was held that the word "or" as printed in the statute should be "on."

McLaughlin vs. Menotti, 105 Cal., 572.

But the Supreme Court of the United States expressly declined to pass upon this point.

Menotti vs. Dillon, 167 U. S., 703.

A simple inspection of the act shows that the printed copy of the laws using the word "or" must be the correct one.

Therefore the plaintiff should have been nonsuited for failure to show that this land did not fall within some of the exceptions.

III.

But we contend that conceding everything the appellant claims as to the date of the definite location of the road, to-wit, October 20, 1868, and the fact that no pre-emption claim was filed until May, 1869, the law is not so harsh as it is contended to be, namely—that unless at the date of definite location the claim had been actually filed in the land office, the grant took effect to the railroad despite the fact that the settler was bona fide, despite the fact that there was no land office, despite the fact that the plat was not filed.

The language of the proviso of July 2, 1864, excepts from the railroad grant any pre-emption or homestead or any other lawful claim.

If the construction asked for by the appellant be correct, all land occupied by citizens and all the towns on Government lands along the Pacific railways, although existing at the date of the definite location, belong to the railroad company, if on the alternate sections. Such a claim has never been made before. The history of the settlement of Utah shows that many towns are located on these alternate sections, but the railroad company has

not yet attempted to claim them. A ruling such as asked for here would be far-reaching in its consequences and of incalculable injury.

It would appear then that the ruling of the Land Office upon this point, which shows that at the date of definite location these lands were settled and occupied, is correct. Congress has given the settlement of these claims to the Land Department. It must pass upon all questions as to the nature of the land and whether it is open to sale, and its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation.

> Steel vs. Smelting Co., 106 U. S., 447, 450, approved.
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> Northern Pacific vs. Colburn, 164 U. S., 383.
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> Barden vs. Northern Pacific Railroad, 154 U. S., 288, at p. 328.

The Department in 1869 allowed a declaratory statement to be filed on this land, thereby deciding it was not railroad land. That ruling is not subject to review here, nor is it complained of. It was never appealed from, so far as the record shows. Nothing is shown as to the grounds on which the Land Department acted at the time.

> Durango Land Co. vs. Evans, 25 C. C. A., 523.
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> Moore vs. Northern Pacific, 45 Pac. Rep., 216.

Thirty years have passed by, many patents have been

issued in Utah, and many townsites have been granted, all despite the fact they were on railroad sections. It is too late for the railroad company or its grantee now to claim that these settled lands were within their grant.

If now we leave out of view the decisions and consider merely the language as it stands, we must reach the same conclusion. Conceding that pre-emption or homestead claim means a filed claim, the words any other lawful claim must mean something else than such claims as are filed. A lawful claim is not one contrary to law. It may well be that the Government is not compelled to recognize the right of a mere settler without entry. Yet such a claim is lawful and Congress has always, as its settled policy shows, tried to protect such claims. In that sense they are lawful and meritorious.

U. S. vs. Tithing Yard, 9 Utah, 280.

As far back as 1860 the Territorial Legislature had recognized and provided for these possessory rights and protected them.

Comp. Laws of 1876, Sec. 612, p. 252.

There was a complete pre-emption in this case, absolutely following the pre-emption law in every particular. The date of settlement made in the declaratory statement is not necessarily the real date; but the fact of filing being allowed, shows that the land office received the entry as prior to the date of definite location, and

the finding of the Register and Receiver, showing that Moroni Olney's settlement was prior to October 20, 1868, shows conclusively that the date of settlement was prior to the date stated in the declaratory statement.

If, then, these lands were within the proviso, they did not pass. And the fact that Moroni Olney's claim lapsed or failed did not cause the lands to revert to the railroad company.

Barden vs. Northern Pacific, 145 U. S., 535.
Hastings vs. Whitney, 132 U. S., 357
Kansas Pacific Company vs. Dunmeyer, 113 U. S., 629.
Northern Pacific vs. Colburn, 164 U. S., 383.

Therefore it appears that this patent was issued after a litigation in the Land Department over the very fact as to whether these lands were open to entry, and the patent issued on that decision cannot be collaterially attacked.

It is respectfully submitted that the decision of the Supreme Court of Utah should be affirmed.

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